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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 675

EMETIA POLIZIO, alias Joe Pledge,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement.

Petitioner seeks a review of the judgment of the Court of Appeals of the State of New York, which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, which in turn affirmed a judgment of the County Court, Queens County, entered May 24, 1948, which convicted him, after trial by jury, of the crime of Bookmaking, a Misdemeanor, under Section 986 of the New York Penal Law (R. 165-167).

Question Presented.

Pledge contends that he was denied due process of law, guaranteed by the Fourteenth Amendment of the Federal Constitution, because of the use upon his trial in the State Court of evidence procured by a State Officer, allegedly by means of unreasonable search and seizure (Polizio's Petition, p. 5).

Facts Material to the Question Presented.

Petitioner was indicted, tried and convicted of the misdemeanor of Bookmaking for having received, accepted and recorded wagers on the outcome of horse races, which wagers were made over a telephone located in his home on the third floor of an apartment house, and were recorded by him on slips of paper (R. 3-5).

As appears in the record, on July 14, 1947, the State Police Officers, having obtained permission from the occupant of the apartment immediately above petitioner's (R. 109), used the fire escape and descended to the landing adjacent to the window of petitioner's premises. While peering through the venetian blinds, Officer O'Connor heard the telephone bell ring on three occasions, and, on each, observed the defendant answer the phone, move his lips as though talking, and then write upon pieces of paper which he placed upon a pile on his desk (R. 114-126). The officer was unable to hear what was being said during the phone conversations (R. 152); nor from his position could he see what was written on the slips (R. 226).

After the third such telephone call, the officer knocked on the window, exhibited his shield, and "told the defendant to open up, he was under arrest" (R. 127). Petitioner, however, immediately "proceeded to rip the telephone out of the wall", and the officer then "broke into the premises and placed the defendant under arrest" (R. 127).

Having effected admission for himself, the officer opened the apartment door to permit others to enter (R. 134).

On the desk, Officer O'Connor found 51 slips of paper, all of which bore records of wagers on horse races (R. 180, 181). Petitioner told O'Connor at that time that the slips represented all the bets he had received that day and that they were all made out in his, petitioner's, hand

(R. 183). Included with those slips were the three upon which the petitioner was observed to have written at the time of the telephone conversations (R. 184). Other paraphernalia used in the bookmaking enterprise were also found on the desk (R. 191, 192). In answer to the officer's inquiries petitioner stated that he had been receiving bets amounting to about $1,000.00 a day; had been operating at that location for about a week; that he had been making book for about twenty years; and that there was no cop who was going to stop him now (R. 208, 209).

The officers had no warrant for the petitioner's arrest or the search of his home, nor had any been issued (R. 169-172). It does appear, however, that the officer from his experience knew petitioner's actions to be those of a bookmaker and had observed him commit a crime (R. 150, 151, 158).

POINT I.

The Arrest Was Legal.

Under the New York Statute (*Code Crim. Pro., sec. 177*) the officer was authorized to make an arrest for the misdemeanor committed in his presence. By Section 178 of that Code he was permitted to break the outer window, admittance having been refused him after he had given notice of his office and his purpose.

It is the petitioner's claim that the arrest was illegal because no misdemeanor had been committed in the officer's presence and to his knowledge. The record negatives this contention, however. There can be no doubt but that the petitioner was actively engaged in the commission of the crime of bookmaking at the time of his arrest, and, in fact, this is conclusively established by his admissions to the police officer (R. 183, 208, 209).

In any event the officer testified that he observed the petitioner while engaged in conversing over the phone; that he saw the notations being made on the slips and that the only papers he seized were those which were in full view on the desk in petitioner's home. It was his testimony, also, that he knew that petitioner was engaged in the illicit enterprise of making book at the time and that he did observe the commission of that crime.

It is our earnest belief that under these circumstances the arrest was not only fully warranted but also proper and legal under the statutory provisions therefor. The mere seizure of the agencies by means of which petitioner carried out his criminal business was, therefore, an incident to the legal arrest, and as such forms the basis of no complaint (*Harris* v. *United States,* 331 U. S. 145).

POINT II.

The use, upon the State trial, of evidence seized by the State Officer did not abridge the petitioner's rights to due process under the Fourteenth Amendment.

As we understand the decisions of this honorable Court, petitioner, being prosecuted in a State Tribunal, was not entitled to the protection given by the Fourth Amendment unless the deprivation of those rights was tantamount to a denial of due process under the Fourteenth Amednment (*Harris* v. *United States,* 331 U. S. 145; 91 L. ed. 1013). We will, therefore, assume *arguendo* the illegality of the arrest, and address ourselves solely to the question "Did the admission into evidence of the documents seized by the State Officer amount to a denial of due process?"

The question is not entirely new. It was first presented to this Court in *Adams* v. *New York,* 192 U. S. 585. At that time the rights now asserted by the petitioner were em-

bodied, not in the State Constitution, but in Section 8 of the New York Civil Rights Law. This Court, however, held that the Fourth and Fifth Amendments of the Constitution contained no limitations upon the power of the States, and said

> "We do not feel called upon to discuss the contention that the 14th Amendment has made the provisions of the 4th and 5th Amendments of the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the state."

The question was again considered by the State Court in *People* v. *Defore,* 242 N. Y. 13, in which case a petition for review by writ of certiorari to this Court was denied (270 U. S. 657).

In the year 1938 the People of the State of New York wrote the statutory provisions covering right of privacy into Article I, Section 12, of the State Constitution. The effect of this change was considered by the Court of Appeals of the State in *People* v. *Richters Jewelers,* 291 N. Y. 161, wherein it was determined that the rule of admissibility remain unaltered.

It is true that since the determination of the *Adams* case the rule to be applied in the Federal courts took an entirely different course. In that jurisdiction it has been held that the fruits of an illegal search and seizure are barred from use at the trial (*Weeks* v. *United States,* 232 U. S. 383; *Gouled* v. *United States,* 255 U. S. 298; *Harris* v. *United States,* 331 U. S. 145). Nevertheless, it was also determined that such evidence, if obtained by anyone not connected with the Federal Government, was still to be

received, and this upon the theory that the prohibition against unreasonable search and seizure affected only the Federal Government and its officers and agencies (*Olmstead* v. *United States*, 277 U. S. 438; *Burdeau* v. *McDowell*, 256 U. S. 465).

In advancing the claim that the admission of this evidence denied due process, petitioner contends that a close parallel exists to the rulings affecting coerced confessions. His theory is that since proof inherently illegal, because created by force, fear and duress, will not be received, by the same token good evidence already in existence will be barred if possession thereof is secured by an illegal search.

We believe that the fallacy of this claim lies in the fact that in the one case the rejected proof is not so much illegally obtained as it is illegally manufactured. It is this prohibitive means of creation which bars the proffered evidence from use. It is rejected because of its own inherent lack of dependability. To permit its use would render a trial a mere sham; it would reduce the judicial process to the level of the rack and the torture chamber. On the other hand, however, the evidence secured by unreasonable seizure, being already in existence but merely obtained improperly, bears no such taint.

Thus it is that although it has been said that both the coerced confession and the evidence obtained by illegal search and seizure are practises contrary to the principles of free government (*Malinski* v. *New York*, 324 U. S. 40; *Feldman* v. *United States*, 322 U. S. 487, dissent of Mr. Justice MURPHY), only the rule of exclusion is applied as to the coerced confession in all criminal prosecutions and in all jurisdictions. As to the evidence illegally seized, however, the bar is raised in the Federal courts only when the government itself prosecutes, and its own officers and agencies are guilty of the offending practises. And this is through the medium of the Fourth Amendment and not

the "due process" clause of the Fifth. As this Court stated in the *Feldman* case,

> "And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177, supra; Gouled v. United States, 255 US 298, 65 L ed 647, 41 S Ct 261; Angello v. United States, 269 US 20, 70 L ed 145, 46 S Ct 4, 51 ALR 409, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. Burdeau v. McDowell, 256 US 465, 65 L ed 1048, 41 S Ct 574, 13 ALR 1159. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials. 'If knowledge of them (the facts) is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it.' Silverthorne Lumber Co. v. United States, 251 US 385, 392, 64 L ed 319, 321, 40 S Ct 182, 24 ALR 1426."

Surely, if it is proper in Federal courts to admit such proof so long as it is not obtained by the governmental agencies or officers, then there can be no assertion that the use of such evidence in State tribunals amounts to a denial of due process. Even were we to assume that such proof when received in a State court is tantamount to compulsory testimony, yet since it is free of the fear of hurt, torture or exhaustion, in rests within the province of the State to determine its own course and its procedural and evidentiary rules (*Adamson* v. *California,* 332 U. S. 46; *Twining* v. *New Jersey,* 211 U. S. 78; *Palko* v. *Connecticut,* 302 U. S. 319). The question being a matter which concerns policy only, the determination of the issues in accordance with the State rule affects none of the constitu-

tional safeguards afforded to the petitioner. As this Court has so ably stated in *Foster* v. *Illinois,* 332 U. S. 134, at 139, in applying the "due process" clause it

> "* * * is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived, not only before the Fourteenth Amendment, but for the 80 years since its adoption."

Conclusion.

In summary we respectfully submit that the record below indicates:

1. That petitioner was lawfully arrested by a police officer in whose presence the crime of bookmaking was committed;

2. That as an incident to such arrest the instrumentalities used by petitioner in committing the crime were lawfully seized;

3. That even though the documentary evidence was seized illegally, there was no deprivation of due process.

The petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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Appendix.

New York Code of Criminal Procedure, Secs. 177 and 178.

"Sec. 177. In what cases allowed.

A peace officer may, without a warrant, arrest a person,

1. For a crime, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

"Sec. 178. May break open a door or window if admittance refused.

"To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."

New York Civil Rights Law.

"Sec. 8. Right of search and seizure.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York State Constitution, Article I, Section 12, so far as material reads:

"Sec. 12. (Security against unreasonable searches, seizures and interceptions)

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."